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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

PAS-PFI

No. 437

CARL C. A. PASS, Petitioner,

v.

J. HOWARD McGRATH, Attorney General of the United States.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1951

No.

Carl G. A. Pass, Petitioner,

v.

J. Howard McGrath, Attorney General of the United States.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered October 5, 1951, affirming an order of the United States District Court for the District of Columbia dismissing petitioner's Complaint.

Opinions Below

The District Court filed no written opinion. The opinion of the Court of Appeals (Rec. 7) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered October 5, 1951. Rec. 8. The jurisdiction of this Court is invoked under Section 1254, Title 28 U.S.C.

Questions Presented

1. Whether a literal construction of §33 of the Trading with the Enemy Act, which would bar suit (by an American citizen who timely filed his claim for administrative relief) under the "exclusive" remedy furnished by §9 of the Act to recover property

seized from him by the Alien Property Custodian, must be avoided where a) it frustrates the Congressional intention to expand the scope of §33 to facilitate the return of property to American citizens, b) it produces absurd and unreasonable results, c) it unlawfully discriminates against Petitioner, and d) it results in an unconstitutional confiscation?

2. Whether an American citizen, who timely filed a claim with the Alien Property Custodian and invoked the administrative rather than the judicial remedy furnished by §9 of the Trading with the Enemy Act may be denied judicial review, after the administrator wrongfully refused to return his property, without thereby rendering the statute, as applied to him, unconstitutional under the due process clause of the Fifth Amendment?

3. Whether a literal construction of §33 does not render the statute unconstitutional as applied to Petitioner because it results in a confiscation that violates the rights guaranteed by the just compensation clause, the due process clause, the treason clause, and the bill of attainder clause, of the Constitution?

Statement of the Case

Petitioner is a native-born citizen of the United States, who was unavoidably present and living in Germany during the war. (Rec. 1). On April 27, 1943, the Alien Property Custodian executed a vesting order whereby he vested the property of Petitioner which was thereafter delivered to said Custodian. (Rec. 1). Said property was transferred by the Alien Property Custodian to the Attorney General on October 15, 1946. (Rec. 2).

In August, 1946, Petitioner obtained a passport of the United States, wherein he is properly described as a citizen of the United States, and returned to the United States, where he has since continuously resided (Rec. 2). On September 23, 1946, Petitioner filed a Notice of Claim with the Custodian for the return of said property (Ibid.) This suit for recovery of

the property was filed in the District Court on October 5, 1949 under §9(a) of the Trading with the Enemy Act, 50 U.S.C. App. §9(a). Petitioner alleged in his Complaint that he is a citizen and resident of the United States, that he was and now is the lawful owner of the property, and that Respondent, notwithstanding a demand for a return, is wrongfully withholding the property from Petitioner. Rec. 2.[1/]

Respondent moved to dismiss the Complaint on the ground that it was barred by §33 of the Trading with the Enemy Act, because not timely filed. Rec. 4. The District Court dismissed the Complaint, Rec. 4-5, and the Court of Appeals affirmed the dismissal.

Statute Involved

Section 33 of the Trading with the Enemy Act, as amended, states in pertinent part that:

> "No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: * * * (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof." Act of July 1, 1948, c. 794, 62 Stat. 1218, 50 U.S.C. App. §33. (Emphasis supplied throughout)

1/ Par. 9 of the Complaint alleges that

> "Notwithstanding the filing of said claim and demand for the return of said property, the property has been retained by the Attorney General, and is now wrongfully withheld from Plaintiff by said Defendant without warrant of law." Rec. 2.

Reasons for Granting the Writ

The decision below is of first impression in the Courts of Appeals. But the questions raised are of such large importance in the administration of the Trading with the Enemy Act that review by this Court is, we believe, plainly warranted. If the decision below is allowed to stand, there will be actual, irremediable confiscation of American property. The decision affects many American claimants. Infra, note. 4.

Petitioner alleged, and on a motion to dismiss respondent cannot controvert,[2] that he is a citizen and resident of the United States, that he owns the property in suit, and that respondent wrongfully refuses to make an administrative return to Petitioner, to which, as a citizen-owner, he is entitled by the express terms of §9. Confiscation therefore results from the erroneous view of the court below that §33 of the Trading with the Enemy Act bars this suit. Since §7(c) makes §9 the exclusive judicial remedy, a denial of the writ means irremediable confiscation. The construction of the court below frustrates the intention of Congress to restore property to citizen-owners and to expand §33 in order to facilitate such returns.

That construction also raises grave constitutional questions. Petitioner invoked the administrative remedy furnished by §9 rather than the judicial remedy, confident that so long as his claim was pending judicial relief was available.[3] It is not disputed that Petitioner timely filed his claim with the administrator. For a short time, it is true, Petitioner had access to

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2/ Land v. Dollar, 330 U.S. 731, 735, fn. 4.

3/ "Section 9(a) of the Act * * * provides for the administrative consideration and allowance of claims to property transferred to the Custodian. A claimant also may sue in a district court for an adjudication of the validity of his claim. Section 32 * * * authorizes the administrative recognition of claims to property in the possession of the Custodian * * *." McGrath v. Manufacturers Trust Co., 338 U.S. 241, 247, fn. 8.

the courts. But the invitation to the administrative remedy, upon which Petitioner and many other Americans relied, 4/ was not red-flagged as a booby trap. Section 9 does not bear a warning to distrust administrative and seek only judicial relief. It does not warn an American citizen who owns vested property that the administrators may confiscate his property in the teeth of §9 and the Constitution.

Had Congress provided solely an administrative remedy which was

"inadequate to secure the return of his property"

to a citizen-owner, the statute would have been unconstitutional. Becker Steel Co. v. Cummings, 296 U.S. 74, 79. Instead the Congress provided both administrative and judicial relief. That did not remove the necessity of "secur[ing] a return" to the citizen-owner who trustingly relied on the administrative remedy. Petitioner had no reason to seek the alternate judicial relief until the administrator wrongfully refused to make a return. To turn the decision in this case on the availability of the alternate judicial remedy is to entrap Americans who, by Congressional invitation, relied on administrative justice. Thereby, through no fault of their own, such Americans will lose judicial review of confessedly wrongful withholding of their property.

4/ In rejecting a parallel administrative construction of another provision of §33, it was said in First Nat. Bank of Portland v. McGrath, 97 F. Supp. 77, 80 (Ore.) that:

> "Thousands of claimants have filed timely claims, confident that, as long as such claims were pending and undetermined, the alternative method provided in Section 9(a) was available to them. If the Government's contention is correct, however, these numerous claimants would be prevented from filing an action because of the inadequacy of the Government's administrative machinery to decide their claims promptly. A claimant who, in good faith, filed a timely claim and who, after years of waiting, has been unable to get an administrative determination thereof, should not be precluded from filing an action to obtain a determination of his rights."

In 175 years of our history confiscation has been confined to property of "aiders and abettors" of the enemy, or property used in "trading with the enemy." The seizure, as distinguished from confiscation, of American property has been held constitutional only because the Act provided a remedy that would secure its return. Never has confiscation of American property because of mere presence in enemy territory been sanctioned. If the decision below is allowed to stand, many Americans who were invited to put their trust in the administrative remedy will suffer wrongful confiscation of their property merely because they were present in Germany during World War II and mistakenly relied on administrative justice. This is a result never intended by Congress and forbidden by the Constitution.

Argument

Introductory

The Court below read the statute with literal exactness, [5] rejecting Petitioner's contention that a literal reading frustrates the intention of Congress. [6] It mistakenly viewed the

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5/ "Since no suit and no claim was pending within two years after the property vested in the Custodian, the 'later' date and the last on which suit could be brought was April 30, 1949. The claim filed with the Custodian in September, 1946 could not toll the two-year period that had expired in 1945."

6/ This was in response to the argument that

> "Where the plain meaning of words used in a statute produces an unreasonable result, 'plainly at variance with the policy of the legislation as a whole,' we may follow the purpose of the statute rather than the literal words." United States v. Rosenblum Truck Lines, 315 U.S. 50, 55.

See also Church of the Holy Trinity v. United States, 143 U.S. 457; Hawaii v. Mankichi, 190 U.S. 197, 212; Markham v. Cabell, 326 U. S. 404, 409.

issue in terms of an unlimited power "to withdraw the privilege of suing the United States," and it relied upon the rule that the "consent to be sued" is strictly construed. Rec. 7. We shall show that where the constitutionality of a summary seizure turns on the adequacy of a remedy for a return, the remedy may no more be withdrawn than denied altogether. This is not simply a case of failure to file before a prescribed deadline, for relief was timely sought from an administrator who thereafter wrongfully refused to carry out the statutory mandate. Hence the effect of "withdraw[ing] the privilege of suing" is to deny judicial review to those who had no reason to anticipate wrongful administrative confiscation. The doctrine that a statute in which the United States consents to be sued must be strictly construed against the citizen has no place where, as here, the consent is accorded not as a "privilege" but is a constitutional imperative. If strict construction be required, literalism can yet not defeat the plain intent of Congress.

The real issues, on the construction of §33 adopted by the court below, are 1) whether Congress may accord an exemption from the running of limitations to some claimants and arbitrarily deny it to others; and 2) whether Congress may decree unreviewable confiscation where citizen claimants invoked administrative rather than judicial relief though the statute contained no warning that the administrative remedy is a booby trap, and where it is admitted that the property is being wrongfully withheld. First we shall show that Congress had no entrapment in mind; it was bent on expanding, not restricting, judicial relief.

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divested American claimants in the 1948 amendment by blotting out the existing tolling provisions, certainly no hint of it was revealed to the Congress.[7] To the contrary, the Senate Report, which incorporated the principal parts of the House Report, said:

7/ In outlining the three main purposes of the bill, the Assistant to the Attorney General, Peyton Ford, omitted all mention of any intention to curb the right to file suits by those who had already filed claims. S. Rept. No. 1532 (set forth in 2 U.S. Cong.Serv.), 80th Cong., 2d Sess., pp. 2263-2265 (1948).

> "No suit pursuant to section 9(a) may be instituted after the expiration of two years from the date of seizure *** or from the date of enactment of this section, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9(a) or 32 hereof."

The limitation for filing suit therefore tolled equally whether the administrative claim was filed two years "from the date of seizure" or two years "from the date of enactment." The reason for the tolling clause, said Senate Report No. 1839 (79th Cong., 2d Sess.), which accompanied the measure, was that

> "In computing the 2-year period, however, fairness requires that there be excluded any period during which a claim for return has been pending pursuant to section 9(a) or section 32 ***." (p. 3)

Petitioner could not have filed his claim under the original §33 nor under the 1948 amendment, i.e., the present act, within two years from the date of seizure, that is prior to April 27, 1945, because he was then in Germany and communication with the United States was impossible. But under the original §33 he could have filed his claim within two years "from the date of enactment", August 8, 1946, as in fact he did, namely on September 23, 1946. The two-year period for filing suit was thereby tolled by the pendency of his claim so that under the original §33 suit today would still be timely. When §33 was amended in 1948 and the "after April 30, 1949" phrase was substituted for the earlier phrase "or from the date of enactment", the draftsmen overlooked the need of making some corresponding change in the two-year tolling clause in order to preserve the tolling for those who filed within two years from "the date of the enactment", thereby effectuating the Congressional policy of "fairness".

If the administrators were seeking to cut down the rights of divested American claimants in the 1948 amendment by blotting out the existing tolling provisions, certainly no hint of it was revealed to the Congress.[7/] To the contrary, the Senate Report, which incorporated the principal parts of the House Report, said:

7/ In outlining the three main purposes of the bill, the Assistant to the Attorney General, Peyton Ford, omitted all mention of any intention to curb the right to file suits by those who had already filed claims. S. Rept. No. 1532 (set forth in 2 U.S. Cong.Serv.), 80th Cong., 2d Sess., pp. 2263-2265 (1948).

> "The purpose of the amendments is to extend the time for filing suits and claims pursuant to the Trading with the Enemy Act until April 30, 1949. This extension of approximately 6 months will enable many claimants who otherwise would be precluded because of insufficient time allowed under the present section 33, to file their claims and suits * * *." S. Rept. No. 1532, supra, note 6 at 2263.

We cannot attribute to Congress an intention by the 1948 amendment to deprive an American of the right to toll suit by the filing of a claim in the face of its expressed intention to expand, not to contract, the time for bringing suit. A restrictive intention is further rebutted by the advice of the Assistant to the Attorney General, Peyton Ford, to the Senate Committee that:

> "Unless the statute of limitations is extended the purpose /to restore property taken from American claimants/ of Congress will be frustrated in many deserving cases." S. Rept. No. 1532, supra, note 7.

It is this Congressional purpose to return property to Americans [8] and to expand §33 so as to make possible more, not fewer, returns that the court below would frustrate by a literalistic interpretation of §33.

2) A Literal Construction Produces Unreasonable Consequences.

a) Having invited claimants to file their claims for administrative relief, it was utterly pointless to compel them in mid-career to abandon the administrative remedy and to resort en masse on April 30, 1949, to judicial suit.[9] From the beginning Congress desired as far as possible to enable claimants to procure a return without resort to judicial process.[10]

8/ We have assembled in the appendix some of the voluminous materials which show an unswerving Congressional intent to restore the property of American citizens.

9/ See supra, note 4.

10/ Congressman Good, in explaining the amendment to §9(a) contained in the Act of July 11, 1919, c. 6, §1, 41 Stat. 35, which extended the categories of relief, stated that

> "this amendment simply gives the Alien Property Custodian the right to restore the property of such neutral citizens * * * without the necessity of their presenting their cases in the courts." 58 Cong. Rec. 1233 (66th Cong. 1st Sess.)

And Congress has increasingly favored administrative remedies. For many claimants, pauperized by the seizure of all their property, the administrative remedy is perforce the only practical remedy. To maintain that Congress intended by §33 to force arbitrarily selected claimants willy-nilly to jettison their claims for administrative relief and institute judicial proceedings instead is to attribute to Congress a violent and irrational departure from the policy favoring administrative relief.

b) A literal construction results in an arbitrary discrimination. Under a mechanistic reading of §33, an American claimant who, like the Petitioner, was marooned in Germany during the war, and who could only file his claim after the conclusion of the war, would be deprived of the benefit of the tolling provision because the two-year period from the seizure, which here occurred on April 27, 1943, would have expired before Petitioner could have filed his claim. But American claimants resident in the United States could file claims within two years from the date of seizure, and under a literal reading suits by them would today be timely, for the statute would toll while their claims were pending. Why should Congress have discriminated in favor of claimants resident in the United States who could file claims within two years of the seizures as against Americans in Germany who were helpless to do so? Certainly Congress repeatedly indicated its solicitude for the latter.[11/]

An intention to discriminate is further rebutted by the legislative history of this very Act. In

> "consequence of separate legislation in respect of Italian-vested property"

11/ In the midst of World War II, Congress repeatedly took the trouble to save naturalized Americans who were in the territory of origin from the presumptions of expatriation set forth in 8 U.S.C.A. §804, finally providing that American nationality was not to be lost until October 14, 1946. See 8 U.S.C.A. § 809.

there was

> "a different period of limitations for such property than is applicable to other property. The proposed legislation would erase distinctions which the passage of time has made unnecessary and treat all World War II claims uniformly." S. Rept. 1532, supra, note 7 at 2264.

Respondent would erect on this effort to achieve "uniformity" in the treatment of "all" claims a new and hurtful discrimination, one that is patently senseless and fraught with grave constitutional doubts; he would grant a tolling exemption to some and deny it to others. And to what end? To shield from judicial scrutiny administrative conduct that is admittedly unlawful.

c) Tested by the policy considerations that underlie a statute of limitations there is no rational basis for the discrimination that results from a literalistic interpretation of §33. Such statutes, this Court has said:

> "are founded upon the general experience of mankind that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity * * *." United States v. Oregon Lumber Co., 260 U. S. 290, 300.

Petitioner timely filed his claim with Respondent and vigorously pressed for its allowance thus rebutting any implication that he was neglecting his claim. The very agency here sued was throughout apprised of the claim asserted by Petitioner and was furnished the evidence underlying the claim. It cannot now argue that it is surprised by a stale claim. No reason therefore exists for construing §33 in such a way as to bar suit, thereby banging shut the "exclusive" statutory appeal from confiscation.

In fine, §33 patently exhibits slipshod draftsmanship which failed to effectuate the Congressional policy of "fairness," supra p. 8. Only a slight emendation is necessary to undo the harm. To implement Congressional intent to "exclude any period during which there was pending a claim for return," ibid., the phrase "in computing such two years" should have been elided by the author of the Act in 1948 when he substituted "after April 30, 1949" for "or from the date of enactment" in the 1946 Act.

If the "computing" phrase is disregarded, the limitation period will toll equally for all claimants, including persons who, like Petitioner, seasonably filed a notice of claim. American citizens must not be reduced to beggary because of a draftsman's blunder, or, what is worse, because an administrative "joker" slipped past an unsuspecting Congress.12/

II

A Literal Construction Would Render the Statute Unconstitutional

We need only mention the "duty" of the court in construing a statute to

> "reach a conclusion which will avoid serious doubt"

of constitutionality, Richmond Screw Anchor Co. v. United States, 275 U. S. 331, 346, a conclusion

> "which removes it farthest from possible constitutional infirmity." Kovacs v. Cooper, 336 U. S. 77, 85.

1) A Literal Construction Results in a Denial of Due Process in its Equal Protection Sense

Let it be assumed that a cut-off date may be arbitrary, that it is solely a matter of convenience. But once an exemption from a cut-off day is afforded to claimants, it cannot, to borrow the phrase of Mr. Justice Frankfurter, concurring, be made

> "available in an obviously arbitrary way." American Communications Assn. v. Douds, 339 U. S. 382, 417.

12/ In the course of a hearing in 1944 on an alien property bill, H. R. 4840, Congressman Michener said:

> "And at the time those powers were given certain things were in contemplation. The difficulty that some of us run into is the fact that we find at a later date that there is authority /claimed/ by virtue of that granted in the War Powers Act which far exceeds anything contemplated by the Congress at the time the law was enacted." Administration of Alien Property Hearings on H. R. 4840, House Comm. on the Judiciary, 78th Cong., 2d. sess., p. 100 (1944).

Such an unconstitutional discrimination exists here. Americans resident in the United States during the war could file their claims within two years of the vesting and thereby toll the limitation on filing suit. But Americans stranded in Germany during the war could only file their notice of claim after war's end. For them, according to the court below, the time for filing suit has run out despite the seasonable filing of an administrative claim. Thus one class of claimants is arbitrarily given a shorter period of limitations than another.

It has been squarely held that such a discrimination violates the 14th Amendment:

> "the state has singled out federal claims or causes of action as such and has prescribed a shorter period of limitations for the bringing of such actions than that prescribed for the bringing of similar actions arising or based upon other than federal laws. * * * Its enforcement would result in denying to those seeking to assert such claims the equal protection of the law." Republic Pictures Corp. v. Kappler, 151 F. (2d) 543, 547 (C. A. 8th), aff'd. 327 U. S. 757. 13/

Although the 5th Amendment does not contain an "equal protection" clause,

> "Our whole system of law is predicated on the general fundamental principle of equality of application of the law; all men are on an equal basis before the law." Truax v. Corrigan, 257 U.S. 312, 331. 14/

That discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment has been given explicit recognition. Detroit Bank v. United States, 317 U. S. 329, 338 (1943); Steward Machine Co. v. Davis, 301 U. S. 548, 585. Given the threat of absolute confis-

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13/ See also Caldwell v. Alabama Dry Dock & Shipbuilding Co., 161 F. (2d) 83, 86 (C.A. 5th).

14/ "Equal protection of the law is the constitutional right of every American citizen. Indeed, it has frequently been said to be essential to due process of law guaranteed by the Constitution. Amendment 5." Pfeiffer Brewing Co. v. Bowles, 146 F. (2d) 1006, 1007 (Em. C. A.), cert. den. 324 U. S. 865.

cation, a law which permits one citizen greater latitude in regaining his property than another is obviously so arbitrary and injurious as to amount to a denial of due process. And where an act is

> "so wanting in basis for classification as to produce * * * a gross and patent inequality,"

it "inevitably leads" to a conclusion that the Fifth Amendment is violated. Brushaber v. Union Pacific R. Co., 240 U. S. 1, 24.

2) A Literal Construction Results in Denial of Judicial Review

It may be asked, how can petitioner complain of denial of judicial review if he had access to the courts for a period however limited? It does not suffice that petitioner was free to abandon his administrative remedy and file suit. For the Congressional invitation to rely on the administrative remedy bore no warning that it was a blind alley. Section 9 does not caution an American citizen who owns vested property that the administrators may confiscate his property notwithstanding that the very terms of § 9 require a return to a citizen who establishes ownership. Petitioner justifiably trusted that if he proved citizenship and ownership respondent would comply with the § 9 mandate to return his property. We repeat, petitioner timely exercised the statutory option and sought administrative rather than judicial relief, as he was encouraged to do by Congress. Not long ago this Court refused to permit entrapment because of

> "a total setting which understandably lulled this petitioner into misconception of the legal consequences of applying for exemption." Moser v. United States, 341 U. S. 41, 46. (Emphasis by Court)

Due process requires that where confiscation is involved judicial review must be provided. [15/] Confronted with a constitu-

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15/ Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418 456, 458; Southern R. Co. v. Virginia, 290 U. S. 190; cf. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 52 (1936); A. & M. Brand Realty Corp. v. Woods, 93 F. Supp. 715, 717 (D. of C.)

tional duty to afford review, could Congress fashion a remedy, upon which it knew thousands of claimants would rely, which actually results in a denial of judicial review? The requirement of judicial review cannot be sidestepped by inducing claimants to rely upon administrative relief and then bolting the courthouse door after the administrator's wrongful refusal to return seals the confiscation.16/

3) A Literal Construction Results in Confiscation

a) Administrative Confiscation 17/ Violates the Fifth Amendment 18/

The Trading with the Enemy Act would be

"of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it." Becker Steel Co. v. Cummings, 296 U.S. 74, 79. 19/

16/ The withdrawal of permission to an alien enemy to sue is to be distinguished. A return to an actual alien enemy is "a matter of grace and so was subject to withdrawal by Congress." Cummings v. Deutsche Bank, 300 U. S. 115, 124. Of course,

> "With enemy owned property *** the United States may deal as it sees fit, *** but it has no such latitude in respect of the property of an American citizen." Henkels v. Sutherland, 271 U.S. 298, 301.

17/ It needs no argument that the permanent and wrongful deprivation of an American's property is confiscation. This Court has stated with respect to the Trading with the Enemy Act that

> "Congress did not attempt the confiscation of the property of citizens ***." Becker Steel Co. v. Cummings, 296 U.S. 74, 79.

18/ The

> "war power does not remove constitutional limitations safeguarding essential liberties." Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 426.

19/ In the court below, Respondent beat a tattoo on the cases holding that the remedy provided by §9 satisfied constitutional requirements. But as the Becker case, supra, shows, the Court postulated that § 9 would secure a return to a citizen. Here Respondent has refused to make a return to a citizen. The remedy is therefore unconstitutional as applied to him. A statute may be valid

> "when given a particular application and invalid when given another." Concordia Fire Insurance Co. v. Illinois, 292 U.S. 535, 545; Great Northern R. Co. v. Washington, 300 U.S. 154, 161.

Indeed, the Government itself told the Congress during World War II that:

> "We couldn't requisition property and refuse to give it back to an American citizen unless he is a cloak /for an enemy./ 20/

We are not unmindful of early dicta which suggest that the property of an American may be forfeited merely because of his war-time residence in enemy territory. In Miller v. United States, 11 Wall. 268, a case involving confiscation of property owned by an "aider and abettor" of the Rebellion (i.e., one guilty of treason), it was said that

> "All who are inhabitants of the enemy's country, with rare exceptions, are enemies whose property is subject to confiscation ***." 11 Wall. at 310.

That dictum was rested on two grounds. The Court first relied on the Prize Cases, which turn on the capture of property in the course of trading with the enemy. 21/ There is not the faintest suggestion that Petitioner's property, located in the Unites States, was ever employed in trading with the enemy.

As its second ground, the Court stated in the Miller case that

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20/ Testimony of J. W. Cutler, Associate General Counsel to the Alien Property Custodian, Administration of Alien Property, Hearings on H. R. 4840, House Comm. on Judiciary, 78th Cong., 2d Sess., p. 23 (1944).

21/ The Prize cases, 2 Black 635, involved the capture of blockade runners, and the question decided was

> "Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as 'enemies' property' whether the owner be in arms against the Government or not?" 2 Black at 671.

Quoting The Sally, 8 Cranch 382, 384, the Court concluded that

> "It is the illegal traffic that stamps it as 'enemies' property'." 2 Black at 674.

In such case the thing is the "offender". Cf. Goldsmith Jr. - Grant Co. v. United States, 254 U. S. 505, 510-511. Such trading with the enemy is today made unlawful by § 3 of the Act and punishable both by conviction and forfeiture under §16.

> "The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which by depriving an enemy of property within reach of his power *** impairs his ability to resist ***." 11 Wall. at 306.

There is no need to "confiscate" property located in the United States to accomplish this objective. Seizure suffices to deprive the enemy of access to such property. The Court of Appeals for the Second Circuit has pointed out that enemy use of such property

> "could also have been prevented by a freezing order issued by the Treasury." Josephberg v. Markham, 152 F.(2d) 644, 648 (C.A. 2d). 22/

When an American leaves enemy territory his American resources are beyond enemy reach. In the present case, when Petitioner left Germany, she lay prostrate. Consequently, the urgent necessity which alone authorizes an invasion of constitutional rights no longer existed. 23/

That interference with constitutional rights under the aegis of the war power must be justified by an impending danger was reaffirmed in Korematsu v. United States, 323 U.S. 214, which involved orders excluding Japanese from the West Coast at a time when that area was deemed in imminent danger of invasion. The Court was at pains to caution that

> "nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify"

22/ Judge Clark (dissenting), said that one of the "premises" of the decision by the majority was "that under the circumstances Cerutti's New York property could not be subjected to enemy uses or enhance the ability of this country to prosecute the war." 152 F. (2d) at 649.

23/ For example, to impress a steamboat into the military service

> "the public danger must be immediate, imminent and impending, and the emergency in the public service must be extreme and imperative and such as will not admit of delay or resort to any other source of supply ***. And it is clear that the emergency must be shown to exist before the taking can be justified." United States v. Russell, 13 Wall. 623, 628.

Even then "the government is bound to make full compensation to the owner." Ibid. See also Mitchell v. Harmony, 13 How. 115, 134; and compare Ex parte Milligan, 4 Wall. 2, 121.

such exclusion orders, 323 U.S. at 218. 24/ We submit, therefore, that the Miller dicta must be confined to the "aiding and abetting" there involved, i.e. treason, and that decision cannot be extended to abridge constitutional guaranties in the absence of impending peril.

The fulcrum of constitutional protection is not geography but citizenship. 25/ The Court of Appeals for the First Circuit has indicated that

> "The Fourth Amendment extends to United States citizens in foreign countries under occupation by our armed forces." Best v. United States, 184 F. (2d) 131, 138 (C.A. 1st) (per Magruder, C. J.)

That was said with respect to an illegal search and seizure by American authorities abroad. An American abroad is no more stripped of protection against unconstitutional confiscation of his American property by American administrative officials simply

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24/ In Schueller v. Drum, 51 F. Supp. 383, 387 (E.D. Pa.) it was held that Mrs. Schueller's pro-Nazi sympathies and connections did not warrant her military evacuation from an important industrial area absent imminent danger, even though the war was then raging:

> " *** where there is a direct interference as here with one's liberty and property, conduct normally beyond the scope of governmental power, such action could only be justified, a constitutional guarantee of freedom can only be abridged, when the danger to the government is real, impending and imminent."

And see Scherzberg v. Maderia, 57 F. Supp. 42, 47 (E.D. Pa.).

25/ When this Court ruled in Johnson v. Eisentrager, 339 U.S. 766, that a writ of habeas corpus was not available to non-resident enemy aliens imprisoned abroad, it was careful to note that:

> "With the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens. Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked to in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." 339 U.S. at 769.

because he is marooned behind enemy lines. [26] As we shall now show, the Treason and the Bill of Attainder clauses prohibit such confiscation.

b) Administrative Confiscation of American Property is Barred by the Treason Clause

Under the Treason Clause of the Constitution, Art. III, Sec. 3, no more than the life-estate of a convicted traitor may be forfeited after a trial by jury surrounded by all the safeguards of that clause. It would be strange indeed if administrative confiscation of a loyal citizen's entire fee could be constitutionally based on the mere fact of presence in enemy territory. History furnishes no support for such confiscation.

During the Revolutionary War, the seizures by the several States of property belonging to their inhabitants were limited to those attainted of treason. Cf. Respublica v. Gordon, 1 Dallas 233 (Pa.); Cooper v. Telfair, 4 Dallas 14; Inglis v. The Trustees of the Sailors' Snug Harbour, 3 Peters 99, 167. Of these enabling statutes this Court said:

> "It is not without weight, that when the Constitution was formed its framers had fresh in view what had been done during the Revolutionary War * * *. They [the statutes] show what was then understood to be confiscable property, and who were public enemies. At least they show the general understanding that aiders and abettors of the public enemy were themselves enemies, and hence that their property might lawfully be confiscated. It was with these facts fresh in memory, and with a full knowledge that such legislation had been common, almost universal, that the Constitution was adopted." Miller v. United States, 11 Wall. 268, 312.

26/ In Kaku Nagano v. Clark, 88 F. Supp. 897, 900 (N. D. Ill. E. D.), which sustained the confiscation of the property of a Japanese national resident in Japan, the court said:

> "A naturalized American citizen in the position of plaintiff herein might have had constitutional protection against the sweeping definition of 'enemy' under the act. Compare [the similar view in] Josephberg v. Markham [192 F. (2d) 644, 649 (C. A. 2d)]."
> 88 F. Supp. at 900.

The Court of Appeals went even further; it reversed and directed a return to the Japanese national. 187 F. (2d) 759 (C.A. 7), cert. granted 20 Law Week 3077 (Oct. 9, 1951).

During the Civil War, President Lincoln, who was ready to press the war power to its farthest reach, entertained such constitutional doubts respecting the Act authorizing confiscation of property belonging to aiders and abettors of the Rebellion because it went beyond the life estate limitation imposed by the Treason Clause, that the confiscation was limited to the life estate of aiders and abettors. 27/ Inhabitants of rebel territory who proved that they had not aided nor comforted the enemy could regain their property. Mrs. Alexander's Cotton, 2 Wall. 404, 422.

Acts of treason are commonly committed on enemy soil. But the limitation on fee simple forfeitures in the treason clause is unqualified; it extends as well to a traitor in enemy country, 28/ as to a traitor at home. The framers of the Constitu-

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27/ "After the Act embodying this and other provisions had passed both houses of Congress and been presented to President Lincoln for approval, it was ascertained that he was of opinion that in some of its features it was unconstitutional, and that he intended to veto it. His objections were that in several of its clauses the provision of the Constitution concerning forfeitures not extending beyond the life of the offender was disregarded. Art. III, 3 /treason clause/. To meet this objection, which had been communicated to members of the House of Representatitves, where the bill originated, a joint resolution, explanatory, as it was termed, of the Act -- but which might more properly be designated amendatory of the Act and restrictive of its operation -- was passed by the House and sent to the Senate. That body, being informed of the objections of the President, concurred in the joint resolution. It was then sent to the President, and was received by him before the expiration of the ten days allowed him for the consideration of the original bill. He returned the bill and resolution together to the house where they originated, with a message, in which he stated that, considering the Act and the resolution explanatory of the Act as being substantially one, he approved and signed both." Jenkins v. Collard, 145 U.S. 546, 553. See also Bigelow v. Forrest, 9 Wall. 339, 350; Wallach v. Van Riswick, 92 U.S. 202, 206.

28/ Best v. United States, 184 F. (2d) 131 (C. A. 1); cf. Chandler v. United States, 171 F. (2d) 921, 929 (C. A. 1).

tion were not so deluded as to confine judicial forfeiture of the property of traitors to a life estate while leaving open the administrative confiscation of an entire fee of a loyal citizen for mere residence in enemy territory. 29/ The Treason Clause, we submit, stands as a bar to such confiscation. 30/

c) Administrative Confiscation is Barred by the Bill of Attainder Clause

The Bill of Attainder clause, Art. I, Sec. 9, bars confiscation that is based solely upon presence in enemy territory. In United States v. Lovett, 328 U. S. 303, this Court characterized as a bill of attainder a statute which,

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29/ "The men who framed that instrument remembered the crimes that had been perpetrated under the pretense of justice; for the most part they had been traitors themselves, and having risked their necks under the law they feared despotism and arbitrary power more than they feared treason." 3 Adams, History of the United States, 468 (1898).

30/ Ex parte Quirin, 317 U. S. 1, cited below by respondent, is certainly not to the contrary. That case involved enemy spies and saboteurs landed on our shores by a German submarine with a supply of explosives for sabotage. They were thus "unlawful combatants," subject to "trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 31, 35. One of the saboteurs was a citizen charged with having renounced his allegiance to the United States. As to him, the Court stated:

> "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents." Id. at 37-38.

Because of this "status of an enemy belligerent," the Court held that

> "the offense is distinct from the crime of treason." Id. at 38.

In distinguishing Ex Parte Milligan, 4 Wall. 2, the Court emphasized that

> "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." Id. at 45.

By the same token, Appellant, a non-belligerent resident in the United States, is likewise exempt from the war power and within the safeguards of the Treason clause.

"because of what Congress thought to be their political beliefs, prohibited respondents from ever engaging in any government work * * *." 328 U. S. at 314.

Quoting Cummings v. Missouri, 4 Wall. 277, the Court said that

"A bill of attainder is a legislative act which inflicts punishment 31/ without a judicial trial." 328 U.S. at 315.

Cummings v. Missouri stands for the proposition, the Court said; that

"legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." Ibid.

Had the Act provided in express terms for the confiscation of property of Americans solely because of presence in wartime Germany, it would have condemned an entire class by legislative fiat and would be no less penal -- and therefore a bill of attainder -- than closing avenues of federal employment. 32/ The net effect of the administrative action in this case is to accomplish precisely such forbidden penal confiscation in reliance upon the Act.

31/ In Cummings v. Missouri, 4 Wall. 277, 320, the Court stated that

"The deprivation of any rights, civil or political, previously enjoyed, may be punishment * * *."

32/ Confiscation of property

"not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency /here there is not even personal delinquency but only residence in enemy territory/ of the owner, are punitive; and punishment should be inflicted only upon due conviction of personal guilt." The Amy Warwick, 1 Fed. Cas. No. 342 at p. 811 (D. Mass.), aff'd. sub. nom. Prize Cases, 2 Black 635 (1863).

CONCLUSION

The literalistic reading of §33 by the court below frustrates the Congressional policy of returning property to Americans and of tolling limitations on suit so long as claims for administrative return are pending. Petitioner did not sleep on his rights; he timely filed his claim. He should not be penalized for relying upon administrative justice, as he was invited to do by the Congress. Congress did not, of course, intend to entrap American claimants into forfeiting judicial review on the issue of confiscation.

Where confiscation is involved, due process requires judicial review, which can no more be withdrawn than initially withheld. In practical effect, the invitation to rely on the administrative remedy denies judicial review by entrapment.

The mere presence of an American in enemy territory does not thrust him outside the protection of the Constitution. That is the inescapable implication of the treason clause. Yet Americans resident in Germany during the war, who have returned and filed claims, have found that on one pretext or another administrative returns are denied to them. Compare Zander v. Clark, 80 F. Supp. 453 (D. Col.), modified and aff'd., 177 F. (2d) 649 (App. D. C.).[32/]

The Government would not dare to claim that an American citizen could be cast into a concentration camp by unreviewable administrative fiat for the reason that he lived in Germany during the war. To strip an American of his property for such residence is no less repellent to American principles. "Property,"

32/ The administrative relief-denying interpretations of the Act have repeatedly been overturned by this Court. Markham v. Cabell, 326 U. S. 404; Clark v. Uebersee Finanz-Korporation, 332 U. S. 480.

said John Adams, "must be secured or liberty cannot exist." 33/ See United States v. Lee, 106 U. S. 196, 220. It is his belongings which shield the common man from sleeping under a bridge. His right to retain them requires the protection which this Court would instantly afford were he rotting in jail.34/

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Raoul Berger
Attorney for Petitioner

Abe Krash
of counsel.

33/ Discourses on Davila (1789-1790) quoted in Coker, Democracy, Liberty and Property 466 (1942). Daniel Webster said that property

> "is the fund out of which the means for protecting life and liberty are usually furnished. We have no experience that teaches us, that any other rights are safe, where property is not safe." Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise the Constitution of Massachusetts, 1820, p. 312 (1853).

34/ The courts

> "have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property." Monongahela Bridge Co. v. United States, 216 U. S. 177, 195.

APPENDIX

Congress Has Consistently Protected American Rights to Recover Vested Property

A. Section 9(a): The 1917 Statute and its Legislative History

Section 9(a) of the Trading with the Enemy Act directs that a return shall be made to a "person not an enemy" who establishes his "interest, right, title" to the property seized and held by the Government. Section 2(a) defines enemy as any individual "resident within the territory" of an enemy. One who, like petitioner, is "resident" in the United States, not Germany, is not an "enemy" and is consequently entitled to a return under §9(a).

That the word "resident" in §2(a) means actual physical presence, cf. Kahn v. Garvan, 263 Fed. 909, 915 (S.D.N.Y.), is made plain by the §2(c) definition of "enemy," which authorizes the President to proclaim

> "natives, citizens, or subjects of any nation with which the United States is at war other than citizens of the United States, 1/ wherever resident * * *"

to be enemies if the public safety requires. 2/ The contrast between the §2(a) "resident within" enemy territory and the §2(c) enemy subjects "wherever resident" emphasizes that the resident referred to in the §2(a) definition of "enemy" means

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1/ This exception was inserted to protect naturalized Americans located in the United States who were "natives" of Germany. Trading with the Enemy, Hearings before Subcommittee of Senate Committee on Commerce on H. R. 4960 (65th Cong., 1st Sess.) pp. 135-136 (1917); 55 Cong. Rec. 4911-4915 (1917). Section 2(c) had never applied to the "native-born American citizens." Id. at 4913. Thus Americans in America were carefully exempted from the power to declare them enemies.

2/ An enemy subject present in the United States could be declared an "enemy" only if he gave "aid and comfort to the enemy", 55 Cong. Rec. 4843, or his "conduct becomes * * * hostile or offensive," id. at 4842, or he had to be "put under special guard." Id. at 4909.

actual presence in enemy territory. When such presence ceases the term "enemy" no longer applies.

This is put beyond doubt by the legislative history. In explaining the bill to the House, Mr. Dewalt said that an "enemy" is

> "described as an enemy by the mere fact of location. In other words, it does not affect a man who is resident in this country." 55 Cong. Rec. 4846 (1917). 3/

Thus residence was identified with "location." Mr. Dewalt further defined an enemy as "one who is living in hostile territory * * *." Id. at 4926.

Congress intended that an American who returned from enemy territory to the United States should lose his "enemy" character. When an amendment to §9 was proposed by Congressman Mann in the original process of enactment, expressly authorizing an American, who returned from Germany after the seizure of his property by the Alien Property Custodian, to obtain an administrative or judicial return, Congressman Montague asked:

> "When he manages to get back to the United States, as the gentleman says, does not his return, ipso facto, remove his enemy character, as if he had never been out of the country?" 55 Cong. Rec. 4979 (1917). 4/

3/ For similar expressions, see 55 Cong. Rec. 4850, 4851 (1917).

4/ This Court early adopted the English rule that

> "* * * whilst an Englishman, or a neutral, resides in a hostile country, he * * * is to be considered * * * as having a hostile character impressed upon him."
>
> * * * * * * * * *
>
> "But this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, * * * it is an adventitious character gained by residence, and which ceases by non-residence." The Venus, 8 Cranch 253, 278-280.

Nevertheless, the amendment was adopted by the House out of an excess of caution.

This amendment and accompanying debate were called to the attention of the Senate at the Senate Committee hearing by Assistant Attorney General Warren who was the draftsman and pilot of the legislation. He stated that it was

> "already provided for by the previous provisions of section 9 as originally drafted."

He said that the amendment covered

> "the case where an American citizen was resident in Germany at the time the funds were taken over, and therefore was an enemy at the time -- that is, an enemy for the purposes of this act <u>at the time</u> -- when the property was taken over, but where he afterwards removed out of Germany; and under those circumstances the Mann amendment gave him a right to sue; but he <u>would have a right to sue anyway</u>, under the bill as originally drafted, because the <u>moment he moved out of Germany</u> he became a United States citizen and <u>came within the general provisions of section 9</u>." Trading with the Enemy, Hearings Before Subcommittee of Senate Committee on Commerce on H.R. 4960, 65th Cong. 1st Sess., pp. 148, 149 (1917).

The elision of the Mann amendment from §9 can be explained only in terms of Mr. Warren's assurances that §9 already provided that remedy.

This legislative history was given effect by the Attorney General who, in construing §9 of the Act, concluded, according to the Alien Property Custodian's 1918 Report to the President, that

> "a claim [under §9(a)] may be filed in cases where the enemy character of a claimant has been altered by change of residence; as, for instance, in the case of <u>Americans resident in Germany</u> * * * at the time their property was taken, but <u>who subsequently returned</u> to the United States * * *." Quoted in 6 Hackworth, <u>Digest of International Law</u>, 217 (1943).

The Attorney General's <u>contemporary</u> administrative construction thus effectuated the Congressional intention.

Respondent may contend that an implied repeal of §9 was accomplished by the definition of "foreign national" contained in Section 5E(i) of Executive Order No. 8389, 12 U.S.C.A. §95a Note, and ratified in the First War Powers Act, 1941, which

includes

> "any person who has been domiciled in * * * a foreign country * * * since the effective date of this Order".

One facet of this contention has already been rejected by this Court in Clark v. Uebersee Finanz-Korp., 332 U. S. 480. Despite the fact that "foreign national" expressly includes Swiss citizens, the Court held that non-cloaking Swiss citizens were entitled to a return of their property under §9, reaffirming that

> "the right to sue, explicitly granted by §9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission." 332 U.S. at 487.

B. The Legislative History of the 1941 Amendment Excludes Power over American Property

Section 5(b) of the Trading with the Enemy Act was amended by Title III of the First War Powers Act, 1941. (Act of Dec. 18, 1941, c. 593, Title III, §301, 55 Stat. 839; 50 U.S.C.A. (Supp.) §5(b)). That amendment was hastily enacted a few days after Pearl Harbor, only on repeated assurances that it did not depart from settled Congressional policy and that Americans in particular were completely exempt from the provisions of the Act.

As originally proposed in H. R. 6206, §301 of the First War Powers Act, 1941, provided for the re-enactment of the Trading with the Enemy Act and its amendments:

> "Provided, however, that no such provision or part thereof shall become operative until such time or times as the President shall find and by Executive Order declare that it would be advantageous in the prosecution of the war for such provision or part thereof to become operative."

This mechanism was employed, administrative proponents explained, because of the difficulty of separating the vital from the clearly lapsed and dubiously vital provisions of the Trading with the Enemy Act. Hearing on H. R. 6206 before the House Judiciary

Committee on December 12, 1941 (hereinafter "House Hearing") pp. 5, 12 (Typewritten transcript in files of House Judiciary Committee). Representative Michener, a member of the House Judiciary Committee, rejected the proposal, saying:

> "But your real joker is in Title III. I see a joker there because you have gone through this." Id. at p. 5. 5/

Faced by irreconcilable opposition, Mr. Oscar Cox, governmental proponent of the legislation, stated:

> "Suppose I get in touch with the legislative counsel of the House and see if we cannot put in in its complete text the Overman Act and the Trading with the Enemy Act and all of the amendments which seem to me to be essential to the issue here, leaving the substance of 301 integrated with the full text."

Mr. Barnes:

> "It amounts to a recodification of those Acts?"

Mr. Cox:

> "Yes." Id. at 30.

Thereafter, Attorney General Biddle appeared before the Senate Committee with the present Title III of the First War Powers Act and stated:

> "What we have to try to do, through a very simple provision, is to give the Alien Property Custodian exactly the same powers he had in the last Act, without going into long, difficult sections." Hearing before Senate Judiciary Committee on S. 2129, December 15, 1941, p. 11 (Copy of typewritten transcript in files of Senate Judiciary Committee).

5/ As Mr. Michener later said on the floor of the House:

> "The original bill was what we commonly call a 'shotgun' measure. No one could tell by reading that bill what it means, what it covers, what powers are given, and to whom." 87 Cong. Rec. 9856 (1941).

The sentiments of Mr. Michener were shared by his Committee colleagues. Mr. Thomas said

> "This is a pig in a poke. Nobody knows what is in it and you do not know." House Hearings on H. R. 6206, supra, at 21. See also Mr. Robsion's remarks, id. at 19.

was merely adopting such a replica. Asked to explain the difference between Title III and the old Act, the Committee Chairman, Mr. Summers, said:

> "* * * for all practical purposes we may say there is no substantial difference. * * * The Committee was largely persuaded by the dis½ covered facts, the recognized facts, that <u>there is no substantial difference</u> insofar as the committee could discover between the powers we propose to grant to this President and the <u>powers which President Wilson had</u>." 87 Cong. Rec. 9859 (1941).

The debate can best be summed up in the words of Mr. Williams:

> "* * * I believe I can say without any question that the <u>present act applies only</u> to those transactions and those properties in which <u>foreign governments</u> or subdivisions thereof <u>or their nationals</u> have an interest. There seems to have been some confusion about that matter here. There is no doubt that was the intention of the legislation at the time it was enacted, and there was a very definite reason for it. It followed immediately the invasion of Norway, Belgium, and Holland by Germany, and it was enacted for the very purpose of protecting <u>their nationals</u> and their property in this country from transactions and transfers forced upon them by the Germans at that time. That was the purpose of it. <u>There was no intention</u> and <u>there is no intention at all now</u> that <u>it should be applied to any</u> transaction or any <u>property in which an American citizen has an interest</u>." <u>Id</u>. at 9865. 6/

6/ Mr. Springer stated that Title III:

> "has <u>practically the identical provisions</u>, as I understand it, that the bill contained which was in force during the last World War." 87 Cong. Rec. 9865 (1941).

Mr. Kefauver stated:
"In any event, <u>this does not go any further</u> than the present law?"

Mr. Gwynne:
"That is correct. There is no doubt of that." <u>Id</u>.at 9863.

The members of Congress were repeatedly assured in unmistakable terms that the Act had no applicability to Americans.

Mr. Summers:
"* * * This is simply a section dealing with alien enemies."
Mr. Kean:
"If it <u>deals only with alien enemies</u> I think it is perfectly all right."
Mr. Summers:
"I believe <u>there is no doubt</u> about that." 87 Cong. Rec. 9859.

* * * * * *

(Footnote continued on following page)

We submit that Congress in 1941 so emphatically articulated its intention to exclude American property from the ambit of the Act, to exclude Americans from the scope of "foreign national," as to require at the very least an interpretation which excludes the power of confiscation if not of seizure with respect to property owned by Americans.

C. Section 32 was Designed to Return Property to American Residents of Germany

No departure from the 1917 and 1941 policy favoring Americans was made in providing for returns in §32, added to

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6 (continued) /

Mr. O'Hara stated that the language
"might cause confusion about whether or not it means both foreigners and citizens of this country."
Mr. Hancock replied:
I believe the gentleman will find the limitation quite clear. * * * It deals with alien property."
Mr. O'Hara insisted, however,
"There is no question about the intention of the committee that this is to deal only with foreign property. That is the point to which I call the gentleman's attention."

To which Mr. Gwynne replied:
"Does not the gentleman think that the entire bill covers nothing but aliens and alien property? There is no question about that, is there?"
Mr. Hancock:
"It is perfectly clear that it is intended by section 301 to deal only with property * * * belonging to aliens." Id. at 9861.

* * * * *

Mr. Gwynne commented:
"* * * It is my understanding, as suggested by the chairman of the committee, that our committee had no thought other than to regulate alien property * * *." Id. at 9862.
Mr. Springer stated:
"As I understand, the gentleman /Mr. Kefauver/, has stated that subsection (b) of Section 301 applies only to nationals of a foreign country who have interest in property in this country."
Mr. Gwynne:
"Yes; I think that is clear." Id. at 9863.

Representatives Gwynne of Iowa and Hancock of New York were members of the Subcommittee that considered the bill. Id. at 9856.

the Trading with the Enemy Act in 1946. 7/ Act of March 8, 1946, c. 83, §1, 60 Stat. 50; 50 U.S.C.A. App. §32 (Supp.)

The Senate Report stated that:

> "The committee also believe that no American citizens who have in fact retained their citizenship, overcoming all presumptions of its loss by virtue of residence abroad, should be prevented from regaining their property solely because of their having remained abroad." S. Rept. 920, 79th Cong., 2d Sess., p. 4 (1946).

The Alien Property Custodian, testifying on H.R. 3750, which emerged as §32 of the Trading with the Enemy Act, declared:

> "The Bill herewith presented * * * would also articulate the authority to restore property to American citizens in those situations where technical authority to vest may have existed because of the claimant's former residence in enemy or enemy-held territory, but where there is no present reason for retention." Hearing before House Committee on the Judiciary on H. R. 3750, 79th Cong., 1st Sess., p. 3 (1945).

The Deputy Assistant Secretary of State, Willard L. Thorp, stated that:

> "You will recall that properties belonging to American or friendly foreign nationals were vested only for protective reasons." Id. at p. 32.

Thus, the legislative history of §32 conforms to the traditional Congressional policy of insuring returns to Americans.

7/ Congress was advised by the Alien Property Custodian of the judicial relief available for the return of property to American citizens. Hearing Before House Committee on the Judiciary on H. R. 3750, 79th Cong., 1st Sess., p. 11 (1945). It was not told of the availability of such relief to American residents who were "technical enemies" by virtue of residence in enemy territory. Supra, pp. 2-3.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 437

CARL G. A. PASS, PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court filed no written opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 7) is not yet officially reported but is printed in the Appendix to this brief (*infra* p. 10).

JURISDICTION

The judgment of the Court of Appeals was entered October 5, 1951 (R. 8). The petition for a writ of certiorari was filed November 20, 1951.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 33 of the Trading with the Enemy Act (60 Stat. 930, as amended, 62 Stat. 1218, 50 U.S.C. App., Supp. IV, 33) provides:

> No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.

QUESTION PRESENTED

Whether Section 33 of the Trading with the Enemy Act bars a suit for return of vested property where the suit was filed after April 30, 1949, and where no suit or administrative claim was filed within two years after the date of vesting.

STATEMENT

Petitioner's suit, filed October 5, 1949, was brought under Section 9(a) of the Trading with the Enemy Act (50 U.S.C. App. 9(a)) to recover property vested pursuant to Section 5(b) of the Act as belonging to a national and resident of Germany. The complaint, as amended, (R. 1-3) alleges, *inter alia,* that petitioner is a citizen and resident of the United States and is not an enemy or ally of enemy; that on June 30, 1943, his property was vested by the Alien Property Custodian (Vesting Order No. 1332, 8 F.R. 9074);[1] and that on the date of vesting petitioner was unavoidably present and living in Germany. The complaint further alleges that in August 1946, petitioner obtained an American passport and returned to the United States; that, on September 23, 1946, he filed a notice of claim with the Alien Property Custodian for the return of the property; and that the Custodian has not returned the property.[2]

Respondent moved to dismiss (R. 4) on the ground, *inter alia,* that the action was barred by

---

[1] By Executive Order No. 9788, 11 F.R. 11981, October 14, 1946, the Attorney General of the United States succeeded to the powers and duties of the Alien Property Custodian. The term "Custodian" will be used in this brief, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

[2] Petitioner repeatedly characterizes Paragraph 9 of the Complaint as meaning that the Custodian has denied him an administrative return. (Pet. Br. 4, 5, 7, 15, 23.) On the contrary, his administrative claim, which was timely filed, has never been denied but has merely been suspended in accordance with usual administrative practice pending the outcome of the present litigation.

the applicable statute of limitations, Section 33 of the Trading with the Enemy Act. The District Court granted the motion (R. 4-5),[3] and the Court of Appeals affirmed, *per curiam*, holding that Section 33 in terms barred the suit and that "there is no merit in appellant's contentions that the statute does not mean what it says and that if it does it is unconstitutional". (App. p. 11.)

ARGUMENT

Section 33 of the Act (*supra* p. 2) provides as to property vested after December 18, 1941, that:

> No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of * * * vesting * * *, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.

The application of these provisions to the undisputed facts of this case is clear. The vesting order was filed with the Division of the Federal Register on June 30, 1943, and became effective on that day.[4]

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[3] The District Court's order also denied petitioner's prayers for relief against J. Howard McGrath as an individual, for a mandatory injunction, and for a three-judge court, holding that the remedy afforded by Section 9(a) of the Act was exclusive and adequate. The only issue raised in the Court of Appeals, and the only issue presented by the petition, is whether the suit under Section 9(a) was barred by Section 33 of the Trading with the Enemy Act.

[4] See Regulations of the Office of Alien Property, 8 C.F.R., § 504.1, 1949 ed.

No claim or suit was filed during the two-year period which ran from that date and expired on June 30, 1945. The filing of a claim in September 1946 could not possibly have tolled a two-year period which had expired fifteen months before. Hence, April 30, 1949, was the "later" date, the last day on which suit could be brought. And petitioner did not file his complaint until October 5, 1949. The conclusion that this suit was barred is thus dictated by the unequivocal language of the statute. And "where the words are plain there is no room for construction". *Osaka Shosen Line* v. *United States,* 300 U.S. 98, 101.

Petitioner seeks support in the legislative history of Section 33 for his argument that Congress did not mean what it said. While it has been said that the courts will not "refer to the legislative history where the statutory language is clear", *Ex parte Collett,* 337 U.S. 55, 61, and cases there cited,[5] even a departure from that rule does not aid petitioner, for the legislative history of this statute furnishes no support for his contentions. The legislative history shows that Congress and the Executive were concerned with persons who, unlike petitioner, were unable to file their claims by August 8, 1948 (the cut-off date of Section 33 prior to the amend-

[5] In *ex parte Collett* petitioner argued that Congress simply failed to realize the effect the codification of the Judicial Code would have upon a particular action. In this case, petitioner's contention is that Congress in fact intended to do the opposite of what its statute says. Clearly this is a much more implausible basis for resort to legislative history than that rejected by this Court in the *Collett* case.

ment), because of the disorganized conditions in the countries of their residence. And these persons, for the most part, were technical enemies, as, for example, residents of enemy-occupied countries and persecuted enemy citizens who were ineligible for judicial relief under Section 9(a) but who had recently become entitled to discretionary administrative relief by the addition of Section 32 in 1946.[6]

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[6] Senate Report 1532, 80th Cong., 2d Sess., refers to extracts from House Report 1843, 80th Cong., 2d Sess., as setting forth the reasons for the enactment of the legislation. These extracts include a letter by The Assistant to the Attorney General to the Speaker of the House, which states in part:

> Section 32 permits return of vested property to any persons save those in certain defined categories hostile to the United States. Among those to whom return is permitted are persons who were enemies under the act only by reason of residence in occupied countries during the war and persons who were persecuted by an enemy government during the war. Section 33 originally provided that claims for return under section 32(a) and section 9(a) must be made within 2 years of the vesting of the property or by August 8, 1948 (2 years from the passage of sec. 33), whichever should be later. * * *
>
> It now appears that the 2 years allowed for the filing of claims has proved insufficient in the case of many claimants. Until recently, many of the occupied countries have been in a disorganized condition in which communication has been restricted and it has been difficult if not impossible for claimants resident in such countries to file claims. Moreover, many potential claimants have been necessarily preoccupied with the problems of day-to-day existence. The plight of the victims of persecution has been ever more arduous. Most of them are presently either in displaced-person camps or dead. Many are presumably unaware of their privileges under the act and, despite the earnest efforts of this Department, will probably continue to be so for some time in the future. Only a very small number of such persons have thus far been able to file claims. The heirs of deceased victims of persecution (who also may file claims under sec. 32), some of whom are American citizens, are in many cases ignorant of the existence of the vested prop-

In amending Section 33 to its present form, Congress provided an additional eight month period of grace to all such claimants, irrespective of whether they had previously taken steps to preserve their rights.

The application of the April 30, 1949, bar date to petitioner certainly results in no injustice. Upon the filing of his claim on September 23, 1946, petitioner could immediately have instituted a suit for return. (Section 9(a).) The simple fact that this suit could have been brought during the two years, seven months and one week prior to April 30, 1949, refutes any notion that appellant was treated unreasonably or unfairly.[7]

Petitioner's attacks on the constitutionality of Section 33 are without foundation. The power of Congress to enact time limits within which suits against the United States must be brought is certainly not open to question. "A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection." *Canadian North-*

---

erty, or of the fact that they are the heirs, or both. Unless the statute of limitations is extended, the purpose of Congress will be frustrated in many deserving cases. [Reprinted in 2 U. S. Code Cong. Serv. 2263-2265 (1948).]

[7] Under the Trading with the Enemy Act, a claimant is not required to await the outcome of his administrative claim before instituting suit. *Stoehr* v. *Wallace*, 255 U. S. 239.

ern Ry. Co. v. *Eggen,* 252 U.S. 553, 562. See also *Chase Securities Corp. v. Donaldson,* 325 U.S. 304; *Mattson* v. *Dep't. of Labor,* 293 U.S. 151. Moreover, the period of limitation may be shortened "provided a reasonable time was given for commencing suit before the new bar took effect" *Canadian Northern Ry. Co., supra,* at 562. Section 33 in its present form became effective July 1, 1948 (62 Stat. 1218). Thus for ten months petitioner was on notice that his suit would be barred if brought after April 30, 1949. This notice was plainly adequate.

Petitioner's arguments that the retention of his property results in a confiscation in violation of the Fifth Amendment or in a violation of the Treason and Bill of Attainder Clauses are addressed, not to the validity of Section 33, but rather to the constitutionality of the remedy provided by Section 9(a). Since the constitutional adequacy of the 9(a) remedy has been repeatedly upheld, see e.g. *Stoehr* v. *Wallace,* 255 U.S. 239, 246, and since Congress can place reasonable time limits upon the pursuit of such statutory remedies, it follows that this case presents no constitutional issue whatever.

Petitioner is receiving the same treatment as all other claimants who failed or were unable to file a claim within two years of vesting. He suggests, however, that this case is important because a large number of claimants will be adversely affected if the decision below is permitted to stand. But in

the two years and eight months since April 30, 1949, only four cases have been dismissed under Section 33 as out of time and in only one other is such a motion pending.[8]

CONCLUSION

The petition presents no important question, the decision below is clearly correct, and there is no conflict of decisions. The petition should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
HAROLD I. BAYNTON,
Assistant Attorney General.
JAMES D. HILL,
GEORGE B. SEARLS,
Attorneys.

DECEMBER, 1951.

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[8] Dismissed: *Kroch, et al.* v. *McGrath*, affirmed *per curiam* on the authority of *Pass* v. *McGrath*, October 5, 1951 (C.A. D.C.), Petition for Certiorari filed, November 30, 1951, No. 455; *Kroll* v. *McGrath*, 91 F. Supp. 173 (D. D.C. 1950); *Heims* v. *McGrath*, not officially reported, #2088-49 (D. D.C. 1950); *Fusae Morimoto* v. *McGrath*, not officially reported, #11,-983WM (S.D. Cal. 1951). Motion pending in *Akari Morimoto* v. *McGrath*, #1024 (S.D. Cal.).

First National Bank of Portland v. *McGrath*, 97 F. Supp. 77 (D. Ore. 1951) (Pet. p. 5) is not in conflict with the above decisions or the decision below. In that case the Government urged that Section 33 provided a maximum four-year limitation with respect to a claimant who filed his claim within two years of vesting. We concede that that contention was properly rejected inasmuch as Section 33 clearly provides for tolling, for as long as the claim is pending, the period of limitations for suits on claims filed administratively within two years of vesting.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10682

CARL G. A. PASS, APPELLANT

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided October 5, 1951

Before EDGERTON, CLARK, and FAHY, *Circuit Judges*

PER CURIAM: Appellant sued under §9a of the Trading with the Enemy Act, as amended, 42 Stat. 1511, 50 U.S.C. App. §9(a), to recover property vested in the Custodian, pursuant to §5(b) of the Act, as belonging to a national and resident of Germany. The complaint alleges that appellant is a native-born citizen of the United States; that he owns the property; that in 1943, when the Custodian took it, he was unavoidably living in Germany; that he returned to the United States in August, 1946 and filed a notice of claim with the Custodian in September, 1946. The complaint was filed in October, 1949. The District Court dismissed it as barred by § 33 of the Trading with the Enemy Act, as amended, 62 Stat. 1218, 50 U.S.C. App., Supp. III, §33.

Section 33 provides ". . . No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the . . . vesting in the Alien Property Custodian . . . of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof." Since no suit or claim was pending within two years after the property vested in the Custodian, the "later" date and the last on which suit could be brought was April 30, 1949. The claim filed with the Custodian in September, 1946 could not toll the two-year period that had expired in 1945. In our opinion there is no merit in appellant's contentions that the statute does not mean what it says and that if it does it is unconstitutional. It is "well established that suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States* v. *Michel,* 282 U.S. 656, 659. "And the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations." *Lynch* v. *United States,* 292 U.S. 571, 581-582, and cases cited." *Maricopa County* v. *Valley Nat'l Bank of Phoenix,* 318 U.S. 357, 362.

Affirmed.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 979901 939

No. 437

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1951

Office-Supreme Court, U. S.
FILED
DEC 27 1951
CHARLES ELMORE CROPLEY
CLERK

CARL G. A. PASS, Petitioner

3

v.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONER IN REPLY TO RESPONDENT'S OPPOSITION

I

In response to the allegation in Petitioner's Complaint that

> "Notwithstanding the filing of said claim and demand for the return of said property, the property is now wrongfully withheld [by Respondent] from Plaintiff *** " (R. 2),

Respondent now states that the claim

> "has never been denied but has merely been suspended in accordance with usual administrative practice pending the outcome of the present litigation." Respondent's Brief, p. 3, fn. 2.

1) On a motion to dismiss, Respondent cannot controvert the allegation that he wrongfully withholds the property notwithstanding a demand for its return. Polk Co. v. Glover, 305 U.S. 5, 9.

2) On December 13, 1949, Petitioner made a formal demand on J. Howard McGrath, Department of Justice, Washington, for immediate return of the property. (Par. 3, Affidavit) That demand was rejected under date of December 23, 1949, in a letter wherein Harold I. Baynton, Acting Director, Office of Alien Property, Department of Justice, wrote counsel for Petitioner:

> "In response to your letter of December 13 to Mr. McGrath I am authorized to state that the request made by you for a return of the property in question of Mr. Pass cannot be granted. *** The matter being in litigation it is to be expected that the merits or demerits of Mr. Pass's claim will be determined by the courts." (emphasis supplied) Ex. A, attached to Affidavit.

In the litigation Respondent procured a dismissal which is the subject of this petition.

3) On the morning of October 5, 1951, some hours prior to the release of the opinion below by the Court of Appeals, counsel for Petitioner conferred with Mr. Thomas H. Creighton, Jr., Chief of the Claims Branch of the Office of Alien Property, and renewed Petitioner's request for an administrative return. Mr. Creighton advised that no return could be made to Petitioner because he had lied to the Nazi authorities about the ownership of, and encumbrances on, his American assets, that such misrepresentations were in violation of the Nazi "freezing" regulations, that in consequence Petitioner had no right to the money under applicable German law, and that these circumstances prevented the return of his property to Petitioner. Par. 5 of Affidavit.

4) If there be any doubt as to the finality of the administrative denial of a return, we respectfully suggest that this Court take jurisdiction, remit the case to Respondent for administrative determination, and retain jurisdiction pending such determination. That course will seem demonstrate that Respondent is bent on the confiscation of Petitioner's property and will preserve Petitioner's right to judicial protection against such confiscation.

II

In arguing that

> "for ten months petitioner was on notice that his suit would be barred if brought after April 30, 1949"

Respondent (Brief, p. 8) misses the point of our petition. Petitioner, an admitted American citizen and owner of the property in suit and therefore entitled to a return of his property under the express provisions of § 9(a) of the Trading with the Enemy Act, had no notice that Respondent would wrongfully refuse to return his property in defiance of the Act. He had no notice to flee from the administrative remedy to the judicial remedy. To the contrary,

> "It must be presumed that the Alien Property Custodian and the Treasurer will perform their respective duties and not /not/, in defiance of the express commands of the statute ***." Stoehr-Zehr v. White, 285 Fed. 949, 954 (App. D. C., 1923).

Respondent vainly (Br., p.8) repeats that

> "the constitutional adequacy of the 9(a) remedy has been repeatedly upheld, see e.g. Stoehr v. Wallace, 255 U.S. 238, 246."

In that case the Court said that there might be executive seizure

> "of property believed to be enemy-owned, if adequate provision be made for return in case of mistake *** ", Id. at 245.
>
> " *** there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious ***." Id. at 246. 1/

See also p. 15 of our Main Brief. Patently the remedy is inadequate to assure a return to Petitioner, an admitted American and owner of the property from whom, the administrator admits, Petitioner's property is wrongfully withheld in defiance of the statute. Absent notice that the administrative remedy was inadequate to secure the

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1/ As was emphasized by Judge Learned Hand:

> "By the capture nothing is condemned, nothing confiscated, nothing concluded. The citizen runs only the risk of temporary dispossession through the misprision of the officials ***." Zahn v. Garvan, 263 Fed. 909, 916 (S.D.N.Y., 1920).

return provided by statute, there was no need to seek judicial review. Petitioner was trapped into foregoing the judicial remedy by the statutory invitation to rely on the adequacy of the administrative remedy. This is confiscation by entrapment. As to him the statute is therefore unconstitutional on the construction of the court below. Needless to say, an intention to confiscate American property can scarcely be attributed to Congress, and § 33 ought to be so construed as to avoid such an interpretation.

Respectfully submitted,

Raoul Berger
Attorney for Petitioner

Suite 1116 Ring Building
Washington 6, D. C.

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No. 437

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1951 4

CARL G. A. PASS, Petitioner

v.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

AFFIDAVIT IN SUPPORT OF PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Raoul Berger, being first duly sworn, deposes and says:

1) That he is counsel for petitioner and is familiar with the documents in, and letters respecting, the cause.

2) That this affidavit is submitted in support of petitioner's reply to Respondent's Brief in Opposition.

3) That on December 13, 1949, petitioner made formal demand on J. Howard McGrath, Department of Justice, Washington, D. C. for an immediate return of the property which was being wrongfully withheld from petitioner.

4) That Exhibit A attached hereto is a true and correct copy of a letter received by affiant from Mr. Harold L. Boynton, Acting Director, Office of Alien Property, under date of December 23, 1949, in reply to said demand.

5) That on the morning of October 5, 1951, some hours prior to the release of the opinion below by the Court of Appeals, affiant conferred with Mr. Thomas H. Creighton, Jr., Chief of the Claims Branch of the Office of Alien Property, and on behalf of petitioner renewed his request for an administrative return and was advised that no return could be made to petitioner because petitioner had lied to the Nazi authorities about the ownership of, and encumbrances on, his American assets, that such misrepresentations were in violation of the Nazi "freezing" regulations, that in consequence petitioner had no right to the money under then applicable German law, and that these circumstances prevented the return of his property to petitioner.

(Signed) Raoul Berger
Raoul Berger

Subscribed and sworn to before me
this 27th day of December, 1951.

/s/ Kathryn R. Hathaway
Notary Public
My Commission Expires
July 31, 1952

O
P
Y

OFFICE OF ALIEN PROPERTY
DEPARTMENT OF JUSTICE,
Washington 25, D.C.

December 23, 1949

Raoul Berger, Esquire
Suite 1115 - Ring Building
1200 - 18th Street, N.W.
Washington 6, D.C.

Re: Claim of Carl C.A. Pass
Pass v. McGrath - Civ. Action No. 4245-49

Dear Mr. Berger:

This letter serves to acknowledge receipt of your letter of December 13, 1949, addressed to the Honorable J. Howard McGrath, and of your letter of December 21, 1949, addressed to Mr. Searls of this office.

In response to your letter of December 13 to Mr. McGrath I am authorized to state that the request made by you for a return of the property in question of Mr. Pass cannot be granted. The property is held by Mr. McGrath in his capacity as Attorney General under the provisions of the Trading with the Enemy Act, and can only be disposed of in accordance with the provisions of that Act. The matter being in litigation it is to be expected that the merits or demerits of Mr. Pass's claim will be determined by the courts.

In your letter of December 21 to Mr. Searls you enclosed the original and copies of a Motion for Leave to Amend the Complaint and of supporting Points and Authorities. In accordance with your telephone conversation on December 22 with Mr. Searls I am returning these papers to you herewith. As Mr. Searls told you, this Office feels that its representation of the Attorney General in his official capacity in the pending suit does not carry with it authority to bind Mr. McGrath in his individual capacity. It is felt that agreement to your motion to amend might raise some question as to the extent of that authority. I suggest, however, that if you will make the necessary arrangements with Mr. Searls by telephone he will be ready to waive the usual requirements of notice so that you can present your motion for leave to amend to the Court at the preliminary call of the motion list at 9:45 A.M. any day next week. Mr. Searls will also be prepared to waive the right to file Points and Authorities in opposition to your motion and will state to the Court that he does not care to be heard on it.

As to the pending motion to dismiss the present complaint you may take this letter as our agreement not to press that motion to a hearing until after the necessary pleading has been filed to your amended complaint.

Sincerely yours,

/s/ Harold I. Baynton
Acting Director
Office of Alien Property
Department of Justice

Enclosure

5

Office Supreme Court, U. S.
FILED
NOV 20 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 437

CARL G. A. PASS, Petitioner,

v.

J. HOWARD McGRATH, Attorney General of the United States.

RECORD AND [redacted] TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Raoul Berger,
Attorney for Petitioner.

Ring Building
Washington 6, D. C.

Abe Krash,
Washington, D. C.

Of Counsel.

APPENDIX

COMPLAINT

Action in Equity

Plaintiff, by his attorney, complaining of the Defendant, alleges:

1. This Action arises under §9(a) of the Trading with the Enemy Act, 50 U.S.C. App. §9(a); and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. Plaintiff, CARL G. A. PASS, was born in the United States, is and always has been a citizen of the United States.

3. Defendant, J. HOWARD McGRATH, is Attorney General of the United States and by virtue of Executive Order No. 9788 is successor to the rights, duties, and privileges of the Alien Property Custodian.

4. On and prior to April 27, 1943, Plaintiff was and now is the lawful owner of all of the property described in Vesting Order No. 1332, more particularly described in Paragraph 5, hereof.

5. On April 27, 1943, at which time Plaintiff was unavoidably present and living in Germany, Defendant's predecessor in interest, the Alien Property Custodian, executed Vesting Order No. 1332, whereby he vested in himself the aforesaid property, which was thereafter delivered to said Custodian.

6. On October 15, 1946, said property was transferred by the President from the Alien Property Custodian to the Attorney General of the United States, as is expressed in Executive Order No. 9788.

7. In August, 1946, Plaintiff obtained a passport of the United States, wherein he is properly described as a citizen of the United States, and returned to the United States, and has since continuously resided in the United States.

8. On September 23, 1946, Plaintiff duly made and filed in duplicate with Defendant's predecessor in interest, the Alien Property Custodian, a Notice of Claim for the return of the aforesaid property in the form and containing the particulars required by said Alien Property Custodian.

9. Notwithstanding the filing of said claim and demand for the return of said property, the property has been retained by the Attorney General, and is now wrongfully withheld from Plaintiff by said Defendant without warrant of law.

WHEREFORE, Plaintiff prays:

(a) That judgment be entered that Plaintiff is entitled to the immediate possession of the property described in Paragraph 4 hereof;

(b) That a decree be entered directing Defendant to account for, deliver and transfer to Plaintiff the aforesaid property, together with all dividends and avails thereof and all right, title and interest therein; and

(c) That such other and further relief be granted to Plaintiff as may be just and equitable.

MOTION FOR LEAVE TO AMEND COMPLAINT

Now comes CARL G. A. PASS, Plaintiff in the above-entitled Cause, and moves that he may be granted leave to amend his Complaint in the following respects:

A. By striking out paragraph 2 of said Complaint and inserting in place of the same the following:

"2. Plaintiff, CARL G. A. PASS, was born in the United States, is a citizen and resident of the United States, and is not an 'enemy or ally of enemy' of the United States within the meaning of the Trading with the Enemy Act."

ORDER

This cause cam on to be heard on the motions of plaintiff to join J. Howard McGrath as a defendant in his individual capacity and for leave to amend the Complaint, and was argued by counsel, and upon consideration thereof it is hereby

ORDERED, ADJUDGED, AND DECREED, that said motions be and hereby are granted.

(s) R. B. Keech
United States District Judge

MOTION OF THE DEFENDANT, J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, TO DISMISS WITH PREJUDICE

Defendant, J. Howard McGrath, Attorney General of the United States, moves the court to dismiss the action with prejudice because the complaint fails to state a claim against the defendant upon which relief can be granted, in that the complaint fails to allege that the plaintiff is not an enemy or "ally of an enemy" within the Trading with the Enemy Act, as amended; and in that it appears on the face of the complaint that the action is barred by the provisions of Section 33 of the Trading with the Enemy Act, as amended, since it was instituted after April 30, 1949, and the property sued for was vested in April 1943.

O R D E R

Upon consideration of the pleadings, oral argument and briefs, and it appearing to the satisfaction of the court that this action is barred by Section 33 of the Trading with the Enemy Act (50 U.S.C., Appendix); that the only suit a plaintiff may bring to recover vested property is one under Section 9(a) of the Trading with the Enemy Act against the Attorney General in his official capacity as a representative

Esq., Department of Justice, Washington 25, D. C., attorney for Appellee, by depositing the same, properly stamped and addressed in the United States Mails.

August 12, 1950.

(signed) Raoul Berger
Raoul Berger

Judge Court; and that a suit for an injunction to recover property will not be entertained where there is an adequate remedy at law, and here the remedy under Section 9(a) of the Trading with the Enemy Act being adequate and the sole remedy available to the plaintiff, it is by the Court, this 3d day of May, 1950,

ORDERED that the motion of J. Howard McGrath, as Attorney General of the United States, to dismiss Count I is granted; that the motion of J. Howard McGrath, in his individual capacity, to dismiss Count II is granted; that the request of the plaintiff to convene a Three Judge Court is denied; and the motion of the plaintiff for an injunction is denied.

(s) Edward M. Curran
JUDGE

CERTIFICATE OF SERVICE

I, Raoul Berger, attorney for the Appellant, certify that I have this day served a copy of the attached brief for Appellant upon George B. Searls, Esq., Department of Justice, Washington 25, D. C., attorney for Appellee, by depositing the same, properly stamped and addressed in the United States Mails.

August 12, 1950.

(signed) Raoul Berger
Raoul Berger

Rec. 8.

United States Court of Appeals

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 10682

CARL G. A. PASS, APPELLANT,

v.

J. HOWARD MCGRATH, Attorney General of the United States, APPELLEE.

Appeal from the United States District Court for the District of Columbia.

Decided October 5, 1951.

Mr. Raoul Berger for appellant.

Messrs. George B. Searls and *Joseph Laufer*, Attorneys, Department of Justice, with whom *Assistant Attorney General Harold I. Baynton* was on the brief, for appellee. *Messrs. George Morris Fay*, United States Attorney, and *Joseph M. Howard*, Assistant United States Attorney, also entered appearances for appellee.

Before EDGERTON, CLARK, and FAHY, Circuit Judges.

PER CURIAM: Appellant sued under §9a of the Trading with the Enemy Act, as amended, 42 Stat. 1511, 50 U.S.C.App. §9(a), to recover property vested in the Custodian, pursuant to §5(b) of the Act, as belonging to a national and resident of Germany. The complaint alleges that appellant is a native-born citizen of the United States; that he owns the property; that in 1943, when the Custodian took it, he was unavoidably living in Germany; that he returned to the United States in August, 1946 and filed a notice of claim with the Custodian in September, 1946. The complaint was filed in October, 1949. The District Court dismissed it as barred by §33 of the Trading with the Enemy Act, as amended, 62 Stat. 1218, 50 U.S.C.App., Supp. III, §33.

Section 33 provides " . . . No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the . . . vesting in the Alien Property Custodian . . . of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Clark and Fahy, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Curiam.

Dated: October 5, 1951

Rec. 9.

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Typewritten Appendix to Appellant's Brief.
2. The opinion of the Court, dated October 5, 1951
3. The Judgment of the Court.
4. This Designation of Record.
5. The Clerk's Certificate.

(s) Raoul Berger
Raoul Berger
Attorney for Appellant

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered 1 to 9, both inclusive, constitute a true copy of the appendix to appellant's brief and of the record and proceedings in the said Court of Appeals, as designated by counsel for the appellant, in the case of:-

CARL G. A. PASS,

Appellant,

v.

J. HOWARD McGRATH,
Attorney General of
the United States,

Appellee.

No. 10,682, - - - - October Term, 1951, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this -- fifth -- day of November -- -- -- -- -- A.D. 1951.

(S E A L) (s) Joseph W. Stewart

Clerk of the United States Court of Appeals
for the District of Columbia Circuit.